Kentucky vs. *The Schuylkill Bank* (Parsons' Select Eq. Cases, 180) has not been overlooked. That case has been much relied on as an authority in point upon the general question before us; and it is certainly true, that in the opinion delivered on pronouncing the judgment, some principles were stated scarcely reconcilable with the conclusion to which we have come. In that case, however, the suit was brought by the corporation against its own fraudulent agent, after it had recognized the spurious issue under an enabling act of the legislature; and in many essential circumstances the controversy differed from the present one. After a careful consideration, we are unable to yield to that decision any controlling influence upon the question now to be determined. We are all of opinion that the judgment should be reversed, and a new trial granted. Ordered accordingly.

In the Superior Court of Cincinnati—General Term, Nov. 1855.

MATILDA CAMPBELL, ADMINISTRATRIX OF ROBERT CAMPBELL, DECEASED, PLAINTIFF IN ERROR, *vs.* PATRICK ROGERS ET AL.[1]

1. An action cannot be maintained by the administrator, or other personal representative of a deceased party, under the Statute of March 25, 1851, requiring compensation for causing death by *wrongful act, neglect,* or *default,* when the act causing the death occurred without the State.
2. That Statute applies only to those cases, where the *wrongful act, neglect,* or *default,* causing death, has occured within the State.

Robert Campbell, the plaintiff's intestate, while employed by the defendants, as engineer on board the steamboat "Fort Henry," was drowned in the Ohio River, in October 1854. When the accident occurred, the boat was navigating the river without the jurisdiction of the State of Ohio; and the deceased fell overboard while on duty. It is charged in the petition that he lost his life by the negligent conduct of the officers and crew of the steamboat, who in their efforts to save him were not only careless, but by their want of

[1] This case is reported in 2 Handy's Rep. 110, and we are under obligation to the Reporters for the sheets.

skill in the management of the vessel, caused one of its wheels to strike the deceased, while struggling in the water, and thereby produced his death. It is also stated the boat was not provided with suitable yawls or other small boats, as required by the Act of Congress, passed August 30th, 1852, entitled "An Act to amend an Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes." In consequence of this omission, it is also stated, the usual means to save persons from drowning could not be applied.

The plaintiff, who is the widow of the deceased, obtained letters of administration upon her husband's estate, from the Probate Court of Campbell County, Kentucky, where he resided; and now brings her action against the defendant, to recover damage for the loss of her husband, under the law of Ohio, passed March 25th, 1851, requiring "compensation for causing death by wrongful act, neglect, or default,"[1] On the trial of the case before Judge Gholson, at special term, the court gave the following, among other charges to the Jury: "That if they should believe from the evidence, the

[1] The following is a copy of the Ohio Act:

An act requiring compensation for causing death by wrongful act, neglect or default. Passed March 25, 1851. (Swan's Stat. 1854, p. 707.)

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, in respect thereof; then and in every such case the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree or manslaughter.

SECT. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person; and the amount recovered in every such action, shall be for the exclusive benefit of the widow, and next of kin, in the proportions provided by law, in relation to the distribution of personal estates, left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death to the wife and next of kin to snch deceased: *Provided* that every such action shall be commenced within two years after the death of such deceased person.

injury resulting in the death of the intestate was inflicted or happened without the State of Ohio, and that the intestate did not reside, or have his domicil or usual place of residence in Ohio, then no action could be brought under the statute of 1851; and independent of that statute, no action could be brought for an injury resulting in the death of the intestate, by his personal representative."

The plaintiff's counsel excepted to this charge, as well as the others given by the judge, but to which it is not necessary now to refer; a verdict having been found for the defendant, a motion was made for a new trial, alleging among other causes, that the court erred charging the law to the jury; the motion was overruled, and judgment entered on the verdict; to all which exceptions were also taken, and are fully set forth on the record.

The plaintiff now seeks to reverse the judgment of the court in special term.

The opinion of the court was delivered by

STORER, J.—The law, as affirmed by the judge in his charge to the jury, presents the only question for our decision. It lies at the threshhold of the case, and our judgment upon it must dispose of the controversy between the parties.

We have already held in *Worley* vs. *The Cin. Ham. & Dayton R. R. Co.* 1 Handy, 481, that an action will not lie at common law by the representative of a deceased person to recover damages for his death, and our opinion is unchanged. We have found no American authority to the contrary since our decision was made, but believe the course of decision in all the States is in harmony with our own. In England the law has been so universally admitted, that we need not again refer to the cases where it has been adjudicated. We may be permitted, however, to quote the language of Mr. Smith, in his notes to *Ashby* vs. *White et al.*, 2 Leading Cases, 131: "Before the recent act of Parliament, 9 and 10 Vict., ch. 93, for compensating the families of persons killed by accidents, no action at law was maintainable against a person, who by his wrongful act, neglect, or default, caused the death of another, though under circumstances which would have given the sufferer a right of action, had he survived; and the husband, wife, parent, or

children of the deceased were without remedy against the wrongdoer, by whom they had been deprived of comfort and support."

It is sought, however, very ingeniously, to maintain this action, and to claim the benefit of the statute, on the ground that the wife always had by the law of nature a right to indemnity for the loss of her husband, and whenever a remedy is provided, as it is contended has been furnished by the statute, the right then existing will be thereby upheld and enforced.

The proposition thus asserted involves another, that if admitted, the remedy may be claimed within any jurisdiction where the wrongdoer can be served with process; and the result must necessarily be, that it is immaterial where the act took place, which caused the decedent's death. In such a case the venue would be transitory, and the judicial tribunals of any State or country may take cognizance of the complaint.

A very able exposition of what are urged to be our natural rights has been submitted by counsel, and the various relations we sustain to our race very skillfully examined and discussed; but sitting as a court of law, established by law, and deriving our power to adjudicate wholly from the law, however instructive and curious are the distinctions made in the argument, we cannot appreciate their application, nor admit their soundness; nor can we regard the maxim "*ubi jus, ibi remedium,*" urged upon us with so much zeal; as a license on our part to disregard established rules, to create a new remedy, and certainly not to provide a new right of action.

When we become members of any civil or political organization, we look alone to the government under which we live to provide the means of protection for our persons and property. If these means prove inadequate, the law-making power must be invoked, to furnish a sufficient remedy, and if necessary, confer a right that did not exist before. It never could be permitted that the party aggrieved might assume a right to exist, and provide also a remedy to enforce it; such an admission would take from the legislature the power to enact the law, and from the courts the authority to expound it.

There always have been, and ever must be, in the imperfect

administration of human law, many cases of hardship, indeed of great suffering, where no relief can be given by the courts, and these cases will continue to occur while the business of the world is subject to so many changes, and is conducted by such a diversity of instruments. "*Damnum absque injuria*," are, in legal parlance, household words, recognized as a settled rule of judicial action, which must determine all questions to which it properly applies, however apparently unjust may seem its application.

Instances might be multiplied, in which wrongs the most grievous are without legal redress. Thus the seduction of a minor daughter, not in her father's service, actual or constructive, furnishes no right of action to the parent, and the injured party herself is without remedy. However erroneous may be the opinion of the judge who decides a legal controversy; however unfit he may be to hold a seat on the bench; however ruinous to the fortunes of suitors may be his judgments, he is yet protected by the same law he has not the capacity to expound; unless he has mingled malice with his ignorance, he enjoys perfect indemnity. And so the owner of land, while excavating the soil, though immediately adjoining his neighbor's property, if he is guilty of no wanton or careless act, cannot be held to answer in damages, though the consequence of the excavation may be the falling of an adjacent building. His act may have produced the injury, but it was his privilege to occupy and improve his own estate, and only when he shall have abused the right, can he be made responsible.

Perhaps a more familiar, and yet striking illustration of the maxim, may be found in the rule, that compels the creditor of the general government, or of a State, to ask as a favor what he certainly should be permitted to demand as a right. The slow and uncertain remedy by petition to the legislature is the only mode of relief, and too often when it is sought, the simplest justice is either postponed, or utterly denied. It cannot then be predicated, from the assumption of the existence of a natural right, that it necessarily follows there is always a remedy.

The case of *Ashby* vs. *White et al.*, Lord Raymond, 938, is generally cited to exemplify the rule, that where there is a right, there is

a remedy; but it was not contended by the counsel then, nor held by the court, when it was heard and decided in the King's Bench, nor when it was finally determined in the House of Lords, 1 Bro. Parl. Cas. 48, that there was any other than legal rights, of which the judicial tribunals could take cognizance.

In *Paisley* vs. *Freeman*, 3 T. R. 45, the judge lays down the rule, "that where cases are new in their principle, it is necessary to have recourse to legislative interposition to remedy the grievance; but were the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent for the courts to apply the principle to any case that may arise two centuries hence, as it was two centuries ago."

The same ruling is found in *Russell* vs. *The Men of Deven*, 2 T. R. 667. It was there held that no foundation existed, upon which the action could be supported, and if it had been intended, the legislature would have interfered and given a remedy. And Lord Kenyon, in referring to the Statute of Winton, to illustrate the principle decided, remarked, "that the reason of the statute was, as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery, must have happened by their neglect; but it never was imagined that the hundred could have been compelled to make satisfaction, until the statute giving the remedy was passed; and undoubtedly no action could be maintained before that time."

In *Le Caux* vs. *Eden*, 2 Douglass, 601, where an action of trespass was brought, for taking a vessel at sea as a prize, upon the question being made, whether such an action would lie, it was determined that "inasmuch as there never had been an action brought in such a case, a case that must have frequently occurred if such an action would lie, that circumstance went strongly to show the general opinion of the profession to be, that no such action would lie." The same argument is very elaborately urged by Dallas, Ch. Jus. in deciding the case of the *Duke of New Castle* vs. *Clark*, 8 Taunton, 620; and by Beardsly, Jus. in *Costigan* vs. *The Mohawk & Hud. Railroad*, 2 Denio, 609.

From the examination of the cases we have quoted, as upon general principles, we must conclude, that where there is no clearly defined legal right, there can be no remedy; and where a right not before existing is created by statute, and a remedy given, the right can alone be asserted in the mode authorized by the statute. Neither the common law, nor the law of nature can be appealed to to sustain the right or aid the remedy; *Miller* vs. *Taylor*, 4 Burrows, 2320; *City of Boston* vs. *Shaw*, 1 Metcalf, 138; *Moncrief* vs. *Ely*, 17 Wendell, 405.

The Statute upon which this suit is brought is in derogation of the common law and the practice of the courts, in that it confers upon the personal representative a right hitherto unknown. Had the decedent when living commenced his action for a personal injury, it would have abated by his death, and of course there would be no survivorship to the heir or administrator; and it never has been supposed that damages for torts to the person, not yet reduced to a judgment, were "*bona notabilia*" to give jurisdiction to the Court of Probate, or a fund for the benefit of creditors. Yet the legislature have practically declared that the action survives, and damages may be recovered, though the injured party has deceased. The remedy is not given to the wife, the child, or any near relative but conferred upon the personal representative alone, who is thereby invested with a new character. He is no longer the administrator merely of the decendent's estate, to collect and distribute the assets, but is made the trustee of others, who alone are interested in the new relation he sustains. His duties are changed, for he cannot be controlled by the general law prescribing his conduct, nor held responsible for the execution of his trust, by the Court of Probate. The introduction of a principle so anomalous, we cannot but think, not only gives an extraordinary remedy, but clearly creates a new right of action.

We are thus brought to the only remaining question: can a foreign administrator, for the death of a non-resident intestate, where the act producing it occurred without the State, be allowed the benefit of the statute?

By the § 236 of the law of 1840, foreign executors and adminis-

trators are permitted to sue in our courts, and thus enjoy a privilege that would otherwise depend on comity only. When they seek the aid of our tribunals to enforce foreign contracts, no relief will be granted, if the courts where the cause of action first arose would not have upheld them; if the agreement was void by the *lex loci*, it will not be enforced by the *lex fori;* and so if there is no right to recover for an alleged injury in the State where it is said to have been committed, there can be none in any other State. It cannot be argued that the character of the act producing the injury, excepts the case from the general principle; but on the contrary, every claim that is attempted to be asserted in Ohio, which had its origin in Kentucky, must have been authorized by her laws. If they do not recognize its existence, it has no legal vitality here.

The record before us establishes the fact, that the decedent came to his death on the Ohio river, between the States of Kentucky and Indiana; and if the right of action then accrued, it must have been permitted by the laws of one or the other of these States, as the jurisdiction of both was mutual and co-ordinate over the subject.

In neither of those States could the wife or children of the decedent have sued at common law, for the loss of the husband, or the father. The Court of Appeals of Kentucky so decided, in *Eden* vs. *Lexington & Frankfort Railroad Company*, 12 B. Munroe, 204, and we understand the same doctrine is held in Indiana; and in neither State was there a statute like ours, conferring a right of action upon the personal representative.

Would it then be just to the courts of these States, or to our own citizens, to extend the provisions of our statute to those for whom it was not enacted, and whose claims it was never intended to embrace? We believe this statute was passed to protect those within our jurisdiction, and who were thus subject to our laws; not to include torts committed in other States. Any other construction might apply the very stringent penalties of the "Act of 1854, to provide against the evils resulting from the sale of intoxicating liquors," to every State in the Union, and permit the results of intoxication in Maine or California to be measured by a rule that did not exist where the drunkenness was occasioned. The person who

may have caused the injury, need only be found in Ohio, and the retribution of our statute will be visited upon him. Such we cannot believe is the law.

We cannot take notice of the criminal codes of our sister States, nor enforce the penalties they impose, nor can our courts punish an offence comitted without our jurisdiction, and so far has this rule been extended, that in *Indiana* vs. *Johns et al.*, 5 Ohio, 217, it was held that a suit could not be maintained upon a penal bond given in another State, where its breach subjected the obligor to a statutory penalty. See also *The Antelope*, 10 Wheaton, 66–123; *Scoville* vs. *Canfield*, 14 Johns. 338–340; *Folliott* vs. *Ogden*, 1 H. Black. 135.

When the legislature of Mississippi, a few years since, declared that the survivor, in a duel, should be compelled to support the family of his victim, it never was supposed that the law was extra territorial, and we have yet to learn, that the survivor in any fatal rencontre, in the States contiguous, was held amenable to the penalty, should he afterwards have become a resident of Mississippi.

This example presents perhaps an extreme case, but it clearly proves, we think, the general rule, that no such action could be maintained.

We have already stated, that the plaintiff could not maintain an action like the present, in either of the States having jurisdiction over the offence complained of, at the time it was committed. No such right as that now asserted existed; but by the law of Ohio, the personal representative is made the trustee of the decedent's kindred, among whom the damages, when recovered, are to be distributed; and it necessarily follows, that the foreign administrator, if allowed to sue in Ohio, must be subject to the same rule; and yet it is difficult to understand, how the plaintiff, who derives all her power from the Probate Court in Kentucky, and is accountable only to the tribunal where she has given her bond, can claim a new character, and assume new relations in Ohio. The damages in the event of a recovery would be assets in her hands, to be distributed as required by the law of the domicil, not of the forum. No trust exists by virtue of any statute of Kentucky, and we cannot perceive how those

who would be entitled by the law of Ohio to participate in the fund, could compel a distribution. The law of descents here is the rule presented, and yet it would be a novel doctrine, if the heirs of the decedent could take their share of his personal estate by any other rule than that which prevails in Kentucky.

We have examined the question before us in all its phases, with an anxious desire to ascertain the true rule of decision, in a case that is at once novel and interesting. Our researches have thoroughly convinced us that the plaintiff has no right to maintain the action, and the judge, in so affirming the law, committed no error. We hold, the statute of 1851 has no extra territorial jurisdiction; that it was intended to operate only in this State; that it created a new right of action, and furnished a new remedy, neither of which can be extended to the present case.

The principle upon which we decide the question, has been recognized by the Supreme Court, in the construction they have given to the law of 1840, "authorizing the collection of claims against steamboats." In *Champion* vs. *Janitzen*, 16 Ohio 91; *Goodsell* vs. *St. Louis*, ib. 178, it was held no extra territorial jurisdiction could be claimed under the statute; its provisions were intended to operate, and could only operate within the State, or the waters bordering on the State.

And we but affirm the same rule, when we apply it to the present action.

The judgment at special term is affirmed.

Ketchum & Headington, for plaintiff.
Lincoln, Smith & Warnock, for defendant.